

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>BRIAN DRY</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 243,841
<b>PRECISION MACHINE AND SUPPLY AND STELLEX PRECISION</b>	)	
Respondents	)	
AND	)	
	)	
<b>HARTFORD ACCIDENT AND INDEMNITY AND TRAVELERS INSURANCE COMPANY</b>	)	
Insurance Carriers	)	

**ORDER**

Respondent Stellex Precision and its insurance carrier Travelers Insurance Company appeal Administrative Law Judge Nelsonna Potts Barnes' September 21, 2001, Award. The Appeals Board heard oral argument on March 19, 2002.

**APPEARANCES**

The claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. The respondent Precision Machine and Supply and its insurance carrier Hartford Accident and Indemnity appeared by their attorney Richard J. Liby of Wichita, Kansas. The respondent Stellex Precision and its insurance carrier Travelers Insurance Company appeared by their attorney, William L. Townsley of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award. Additionally, although not listed as part of the record in the Administrative Law Judge's Award, the May 13, 1999, Settlement before Special Administrative Law Judge James R. Roth is part of the record.

**ISSUES**

The Administrative Law Judge (ALJ) awarded claimant a 36 percent permanent partial general disability based on a work disability for a series of accidental injuries culminating on June 14, 1999.

Respondent Stellex Precision (Stellex) and its insurance carrier Travelers Insurance Company (Travelers) appeal and contend that (1) claimant failed to prove he suffered an accidental injury arising out of and in the course of his employment on June 14, 1999, (2) claimant's increased injury and disability was, instead, the natural and probable consequence of a September 22, 1998, work-related low back injury while employed by Precision Machine and Supply (Precision) the predecessor of Stellex which was insured by Hartford Accident and Indemnity (Hartford) and, (3) if claimant did suffer a compensable injury on June 14, 1999, claimant's permanent partial general disability benefits are limited to an award based only on his permanent functional impairment.

Precision Machine and Supply (Precision) and its insurance carrier Hartford Accident and Indemnity (Hartford) request the Board to affirm the Award. Precision and Hartford argue the record proves that claimant suffered a new and separate accident which resulted in increased injury and disability with a June 14, 1999, accident date. Thus, Precision and Hartford argue any resulting increase in disability is the responsibility of Stellex and Travelers because Precision was sold to Stellex on April 22, 1999, and Hartford's coverage also ended on that date.

In his brief before the Board, the claimant does not address the issues of whether claimant suffered a new injury on June 14, 1999, or instead whether claimant's increased disability was the natural and probable consequence of his original September 22, 1998, compensable injury. The claimant does argue he is entitled to a higher work disability based on a lower post-injury average weekly wage than found by the ALJ.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Board makes the following findings and conclusions:

**Is Claimant's Increased Disability a New Injury or is it the Natural and Probable Consequence of the Original Compensable Injury?**

Claimant started working for Precision in April 1994. Precision manufactures airplane parts. Claimant was employed as a computer numerical control milling operator. (CNC operator).

Claimant's job duties consisted of loading both heavy and light parts into the milling machine either by hand or with a forklift. Claimant would make the right settings on the

machine to mill the part and he would start the milling machine by pressing a button. While the machine was milling the part, claimant would either sit or stand while observing the milling process. Approximately every 10 minutes, claimant would blow metal chips away from the part with an air hose until the milling process was completed. Some large parts would take up to three days to complete the milling process. The part would then be unloaded either by hand or with a forklift and the process would be repeated. Claimant also swept and generally cleaned up around the machine which included scooping the chips up with a shovel.

On September 22, 1998, claimant injured his low back while he and his supervisor were loading a 125 pound part into the milling machine. The part needed to be rotated 180 degrees in order to fit into the machine properly. Claimant squatted over the part and lifted the part to rotate it. At that time, claimant felt pain and discomfort in his low back area.

Precision first provided medical treatment for claimant's low back injury through Dr. Ron Davis. Because claimant did not improve, he was eventually referred to physical medicine and rehabilitation physician Dr. Philip R. Mills.

Dr. Mills first saw claimant on February 2, 1999, with complaints of low back pain occasionally radiating into his right leg. Dr. Mills diagnosed claimant with bulging discopathy. Claimant was placed in a physical therapy program and encouraged to develop a daily walking program.

On March 9, 1999, Dr. Mills determined claimant had met maximum medical improvement. Based on the American Medical Ass'n *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed.) (*AMA Guides* [4<sup>th</sup> ed.]), he assigned claimant a 3 percent permanent functional impairment for his bulging discopathy. Dr. Mills permanently restricted claimant to lift with good body mechanics and avoid lifting bulky type objects without the assistance of another employee. Dr. Mills also noted that claimant was able to do his job by avoiding lifting more than 20 to 30 pounds.

On May 13, 1999, claimant, appeared pro se, before Special Administrative Law Judge James R. Roth. At that time, claimant settled his workers compensation claim against Precision and Hartford for the September 22, 1998, work accident and resulting low back injury for a 3 percent permanent partial general disability running award in the total amount of \$4,556.70. That settlement represented 12.45 weeks of permanent partial general disability benefits at the maximum compensation rate of \$366. Future medical treatment was left open upon application and approval of the Director until January 12, 2000. Also, the right to review and modification was left open.

Claimant continued to work for respondent as a CNC operator. Claimant was able to perform his regular job without accommodations. Claimant testified that the only time he had lifted as much as 125 pounds was the time that he rotated the part on September

22, 1998, resulting in his low back injury. After that injury, Precision prohibited him from lifting those heavy parts.

After Dr. Mills released claimant on March 9, 1999, claimant had occasional flare-ups of increased low back pain. Those flare-ups occurred without a specific precipitating event. Those flare-ups would occur after work as well as after activities that he performed away from work. After a flare-up, the claimant would take an aspirin, lay down for a while, and the pain would resolve.

On the morning of June 15, 1999,<sup>1</sup> claimant got out of bed, took a step with his right foot and experienced debilitating low back and radicular pain running down his right leg resulting in numbness and weakness. That was the first time claimant had experienced shooting radicular pain into his right leg. Claimant had worked on Monday, June 14, 1999, without experiencing any physical problems. After work, claimant went home, watched television, cooked dinner and went to bed. Claimant had such severe pain after the Tuesday, June 15, 1999, incident he could not go to work and that was the first time he had missed work because of low back pain. Claimant reported the increased low back and right leg pain to his new employer Stellex.

Claimant returned to see Dr. Mills on June 21, 1999. Dr. Mills found claimant in distress with increased low back pain, right leg pain and decreased sensation in claimant's right foot. The claimant gave Dr. Mills a history of increased pain beginning "without a clear initiating event."<sup>2</sup> After Dr. Mills examined the claimant, his assessment was right L5 radiculopathy. He took claimant off work, prescribed pain medication and scheduled claimant for a MRI examination.

Claimant returned to Dr. Mills after the June 27, 1999, MRI examination. The MRI examination showed a large disc extrusion at L4-5 on the right. As the result of the disc extrusion, Dr. Mills decided claimant was in need of a surgical consultation but Hartford refused to authorize the consultation.

Because Precision was sold to Stellex on April 22, 1999, and Hartford's coverage ended on that date, Hartford refused to pay any of claimant's medical treatment for his present L4-5 disc herniation. As a result, on July 8, 1999, claimant filed an Application for Hearing claiming that his current need for medical treatment was the result of the original September 22, 1998, work-related low back injury.

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<sup>1</sup> Throughout the litigation of this case, there was a considerable amount of confusion in the record regarding whether claimant experienced the increased debilitating pain on Monday, June 14, 1999, or Tuesday, June 15, 1999. But at the regular hearing, it was clarified that claimant had worked on Monday, June 14, 1999, without problems and he suffered the increased debilitating pain on Tuesday, June 15, 1999, as he got out of bed and took a step. R.H. at 44-45.

<sup>2</sup> Mills Depo., Ex. 2, June 21, 1999, medical note.

On August 31, 1999, a preliminary hearing was held on claimant's request for medical treatment and temporary total disability compensation. In a preliminary hearing Order dated August 31, 1999, the ALJ found claimant's current complaints and need for medical treatment were the natural and probable consequence of his September 22, 1998, low back injury. The ALJ's preliminary hearing Order clarified that the preliminary hearing was a post-award medical treatment request in accordance with the May 13, 1999, Settlement. Dr. Mills was appointed as claimant's authorized treating physician and Precision and Hartford were ordered to pay weekly temporary total disability compensation benefits until claimant was released to return to work.

After the August 31, 1999, preliminary hearing Order, Dr. Mills, as claimant's authorized treating physician, referred claimant for surgical consultation with neurosurgeon Dr. Paul S. Stein. Dr. Stein saw claimant on September 22, 1999. His initial impression was extruded disc at L4-5 on the right with L5 and possible S1 radiculopathy. After discussing treatment options, claimant decided to proceed with surgery. On October 5, 1999, Dr. Stein performed a laminectomy and partial discectomy at L4-5.

Dr. Stein followed claimant until December 3, 1999, when he returned claimant to Dr. Mills' care for occupational therapy, decision on returning claimant to work and any permanent functional impairment rating. Dr. Mills placed claimant in a post-surgery physical therapy program. On January 17, 2000, Dr. Mills found claimant doing well with only mild aching in his low back area and no right leg pain except occasionally in the right ankle. Dr. Mills determined that claimant had met maximum medical improvement. He assessed claimant with a 15 percent permanent functional impairment. The doctor imposed permanent restrictions on claimant's activities of lifting with good body mechanics and avoid lifting over 75 pounds maximum.

Claimant returned to his regular job as an CNC operator. Stellex, however, did weigh the parts and tools claimant used in order to insure he did not exceed his permanent restrictions. Claimant also maintained proper body mechanics in performing his work duties. Other operators assisted claimant when he had to pick things up from the floor and at certain times when he was unloading parts from the milling machine.

On February 4, 2000, Stellex had to reduce their work force and claimant was laid off along with approximately 20 employees.

Four physicians testified in this case. Two were claimant's treating physicians Dr. Mills and Dr. Stein. Also, physical medicine and rehabilitation physician Pedro A. Murati, M.D. examined claimant and testified on his behalf. Orthopedic surgeon C. Reiff Brown examined claimant and testified on behalf of Precision and Hartford.

On the question of new injury versus natural and probable consequence of a compensable primary injury, all four physicians were extensively questioned and provided a variety of opinions. The ALJ found claimant suffered a new injury from a series of

accidents culminating on June 14, 1999. The Board, however, disagrees with that conclusion. The Board concludes the more persuasive and the greater weight of the medical evidence, coupled with claimant's testimony proves that claimant's extruded L4-5 disc, need for surgery, and resulting increased disability was not a new injury but was the natural and probable consequence of claimant's original compensable September 22, 1998, work-related accident. That accident occurred while claimant was employed by Precision and insured by Hartford.

In analyzing the new injury theory versus the natural and probable consequence theory of injury, under the Kansas Workers Compensation Act, a review of selected appellate court decisions is helpful. Every natural consequence of a compensable injury is also compensable, even a new and distinct injury, if it is a direct and natural and probable result of the original compensable injury.<sup>3</sup> In both *Reese* and *Chinn*, the court allowed recovery for a back strain caused by claimant's limping after a compensable lower extremity injury. Another example of the appellate court finding a natural and probable consequence was in *Gillig*,<sup>4</sup> where the claimant suffered a compensable knee injury in January 1973, and over two years later in March 1975, claimant experienced increased symptoms in the knee as he stepped down from a tractor on his farm. Later, his knee locked up while he was watching television. One of the facts the Kansas Supreme Court considered in affirming the district court holding that the original injury was responsible for the current surgery was that claimant's original injury remained symptomatic and had not healed.

In contrast, a subsequent reinjury of a compensable injury is not compensable if it resulted from a new and separate non-work related accident.<sup>5</sup> In *Stockman*, claimant suffered a compensable back injury. One day after being released to work, the claimant reinjured his back at home while picking up a tire. The *Stockman* court found the second injury was a new injury and stated:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.<sup>6</sup>

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<sup>3</sup> See *Reese v. Gas Engineering & Construction Co.*, 219 Kan. 536, 548 P.2d 746 (1976); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>4</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

<sup>5</sup> See *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

<sup>6</sup> *Stockman* at 263.

In another case, claimant had suffered a compensable December 8, 1983, knee injury and returned to work in May 1984. In June 1994 his previously injured knee gave way while lifting a 60 pound case of vegetables. Claimant fell backwards and injured his back. The court ruled the back injury was not a compensable consequence of the original injury. It was instead, a separate accident, which included independent trauma caused by his knee giving away when he lifted the 60 pound case of vegetables.<sup>7</sup>

In the *Graber*<sup>8</sup> case, the court holdings in *Gillig* and *Stockman* were reconciled by the Kansas Court of Appeals. The court noted that in *Gillig* the claimant had a torn cartilage that had never healed and remained symptomatic. *Stockman*, on the other hand, involved a distinct reinjury of a compensable back strain that had subsided. The court held that claimant's reinjury was the result of a intervening new accident because "the slip was a distinct traumatic inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."<sup>9</sup>

The Board finds the test of whether the need for medical treatment and the increased disability is the direct and natural consequence of the compensable primary injury or whether it is a new and separate injury is determined primarily on whether or not an independent trauma was involved that would cause a new injury. For example, in *Stockman*, the claimant tossed the tire into the trunk of the car. Similarly, in *Wietharn*, claimant's knee gave away under the stress of lifting 60 pounds. In contrast, in *Gillig*, the claimant merely stepped down from his tractor. There was no separate trauma apart from the ordinary use of the leg. The injury from the knee giving away was treated as a compensable consequence of the original injury.

Here, after the September 22, 1998, compensable accident and resulting low back injury claimant missed no work. While he was receiving conservative treatment for the low back injury, he continued to perform his regular job and all of his daily living activities. At the time claimant was released from Dr. Mills on March 9, 1999, he had some continuing pain in his low back but the pain in his right buttocks had resolved. Claimant also had some temporary flare-ups of low back pain but that pain resolved after a few hours of rest. Those flare-ups occurred at times after he had performed his work activities but also after he had performed activities outside of work. Claimant was asked if he thought he had sustained a new work injury on 6-14-99, when he herniated the disc. Claimant answered,

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<sup>7</sup> *Wietharn v. Safeway Stores, Inc.*, 16 Kan. App. 2d 188, 820 P.2d 719, rev. denied 250 Kan. 808 (1991).

<sup>8</sup> *Graber v. Cross Roads Cooperative Ass'n.*, 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982).

<sup>9</sup> *Graber* at 729.

"No." Also, claimant believed the bulging disc he had originally suffered in the September 22, 1998, accident progressed into the present herniated disc.<sup>10</sup>

In a letter to Hartford's attorney dated March 29, 2000, Dr. Mills opined, "I believe Brian's problem is causally related to his original injury of 09/22/98. I believe his problem was the direct and probable aggravation of that injury."<sup>11</sup> Dr. Mills also testified that from a medical standpoint claimant's ultimate disc herniation was a direct and probable progression of his original injury. Dr. Mills went on to testify that he "didn't feel that the majority of the injury occurred after March 9, 1999, but, in fact, before and what you had is the straw that broke the camel's back occurring sometime after March 9, 1999, and sometime before I saw him in June."<sup>12</sup>

Dr. Stein met with Travelers' attorney on March 9, 2001. In a medical note dated that day, Dr. Stein opined, in part:

Mr. Townsley had a question in regard to causation since Mr. Dry did work subsequent to his initial injury of 9-22-98, until 6-15-99. Apparently he got out of bed on the morning of 6-14-99, and as he took a step started to have severe and excruciating pain going down the leg. I told Mr. Townsley that I felt that, based on his history, Mr. Dry had injured his disc and weakened the ligament and annulus that hold the nucleus in place on 9-22-98. The disc then subsequently ruptured without any additional substantial incident of injury. I think, therefore, that the rupture of the disc was inevitable and related to the original injury of 9-22-98. There appears to be no history, as I understand it, of any additional major injury that would affect the disc anymore than normal activity either at work or at home. It would be my opinion that the disc rupture itself began at the time of the 9-22-98 injury and would have inevitably occurred even had he not returned to work.<sup>13</sup>

Then on March 16, 2001, Dr. Stein met with Hartford's attorney. In a medical note of that date, Dr. Stein opined, in part:

...I did feel that this disc rupture was inevitable given the initial injury. I don't think it made a whole lot of difference in terms of going back to work or daily activities based on what I understand of what his work activities were. He told me about an incident in which Mr. Dry was helping his father-in-law on a roof but states that he wasn't doing a lot of bending or lifting. He had some

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<sup>10</sup> R.H. Trans. at 42.

<sup>11</sup> Mills Depo., Ex. 2.

<sup>12</sup> Mills Depo. at 45.

<sup>13</sup> Stein Depo., Ex. 1, March 9, 2001, medical note.

back discomfort after that. I don't know that that made any difference as well."<sup>14</sup>

Upon a review of Dr. Stein's deposition testimony, the Board finds Dr. Stein did not materially change the opinions he stated in the foregoing medical notes of March 9, 2001, and March 16, 2001.

Dr. Brown and Dr. Murati also expressed opinions on the question of new injury versus the natural and probable consequence of claimant's original injury. After review of their one-time medical examination of claimant and a review of their testimony, the Board acknowledges both Dr. Brown and Dr. Murati, at times during their testimony, expressed an opinion that claimant's lifting activities at work could have aggravated or accelerated claimant's disc herniation. But the Board finds claimant's testimony that he did not suffer a separate accident at work, coupled with the medical opinions of claimant's treating physicians support the conclusion that claimant's disc herniation was progressive.

All four physicians agree the L4-5 disc was initially damaged as the result of the original September 22, 1998, lifting accident. Thereafter, claimant was able to perform his daily work activities and also his daily living activities until June 15, 1999, when he got out of bed, took one step and suffered the herniated disc. The fibers of the annulus surrounding the nucleus of the disc had been initially damaged and weakened and then progressed without any particular evidence of a traumatic event and finally tore, extruding the nucleus through the annulus causing claimant to have severe increased low back and radicular right leg pain.<sup>15</sup>

The Board concludes that the greater weight of the evidence contained in the record as a whole proves that the facts in this case are more analogous to the facts in *Gillig* where the claimant remained symptomatic after the original injury and then merely stepped down from his tractor and experienced increased pain resulting in the need for surgery and increased disability. Here, as in *Gillig*, there was no separate trauma apart from the ordinary use of the leg. The Board, therefore, concludes that claimant's need for surgery and increased disability was the natural probable consequence of his original compensable September 22, 1998, work accident and the increased disability benefits should be computed based on the date of accident of September 28, 1998.

### **What is the Nature and Extent of Claimant's Disability?**

Doctors Mills, Brown and Murati all expressed opinions on claimant's permanent functional impairment as a result of claimant's low back injury. All physicians utilized the AMA Guides (4<sup>th</sup> ed.) in determining claimant's permanent functional impairment. Dr. Mills

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<sup>14</sup> Stein Depo. Ex. 1, March 16, 2001, medical note.

<sup>15</sup> Stein Depo. at 14-15.

opined claimant's permanent functional impairment totaled 15 percent which included the 3 percent permanent functional impairment assessed before the June 15, 1999, disc herniation. Dr. Murati opined claimant sustained a 20 percent permanent functional impairment which also included the 3 percent previously assessed before the June 15, 1999, disc herniation. Dr. Brown opined that claimant's permanent functional impairment after the June 15, 1999, disc herniation was 10 percent and he would have assessed 5 percent before the disc herniation. The Board finds all three of these permanent functional impairment ratings are credible and should be given equal weight in determining claimant's appropriate functional impairment. Thus, the Board concludes that claimant's permanent functional impairment is 15 percent after the June 15, 1999, disc herniation and 3 percent of the 15 percent rating was included in the 15 percent rating which was previously paid in claimant's May 13, 1999, Settlement.

After the original September 28, 1998, work-related accident, claimant did not miss any work until the June 15, 1999, disc herniation. Following the June 15, 1999, disc herniation, claimant was off work from June 15, 1999, until he was released by Dr. Mills to return to work on January 17, 2000. During that period, claimant received 27 weeks of temporary total disability compensation. Claimant returned to work on January 18, 2000, and was laid off for economic reasons on February 4, 2000.

Before claimant was laid off, he worked his regular job as a CNC operator at the same weekly wage as he had earned before the injury. Claimant did testify that Stellex weighed the parts and tools he had to lift to make sure that he was working within his permanent work restrictions and he had some help from other operators for some of his work tasks. But the Board finds that claimant was returned to an unaccommodated job because the evidence does not persuade the Board that Stellex had to make sufficient adjustments in claimant's job to characterize the job as accommodated.

Thus, the respondent, based on *Watkins*,<sup>16</sup> argues claimant is not entitled to a work disability award because he returned to unaccommodated work and was then laid off, not because of his injury, but because of economic reasons.

But the Board has previously held the logic of the *Watkins* case does not apply to the present version of K.S.A. 44-510a because it defines permanent partial general disability entirely different from the version addressed by the Kansas Court of Appeals in *Watkins*. The former version of 44-510a, which *Watkins* addressed, predicated permanent partial disability upon two considerations – the workers loss of ability to perform work in the open labor market and the worker's loss of ability to earn a comparable wage. But the present version of 44-510a, which applies to this case, measures permanent partial general disability based upon two different prongs – a worker's actual wage loss and the worker's loss of ability to perform actual former work tasks.

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<sup>16</sup> *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

The Board finds there is no reason to repeat the Board's rationale for not applying *Watkins* to the present work disability definition. Therefore, the Board's rationale as set forth in the Board's decision in *Tallman* will be adopted as if specifically set forth in this Order.<sup>17</sup>

Doctors Mills, Brown and Murati also all imposed permanent restrictions on claimant's activities and expressed opinions on claimant's loss of work task performing ability. Vocational expert Jerry Hardin, after interviewing the claimant, completed a list of work tasks claimant had performed in jobs during the 15 years next proceeding the accident date.<sup>18</sup>

After Mr. Hardin completed the list of work tasks, claimant corrected the task description of the job he performed at Lamar Electric Air on page E of Mr. Hardin's work task list. Claimant testified that none of those work tasks were performed repetitively and the task of operating the lathe machine should reflect that the lifting requirement was lifting occasionally for 2 to 40 pounds as he was not required to lift frequently or constantly 2 to 40 pounds. Claimant also corrected the lifting requirement for the task of loading and unloading parts indicating that he only had to lift 1 to 30 pounds on an occasional basis and did not have to lift 1 to 30 pounds either on a frequent or constant basis.<sup>19</sup> Also, Mr. Hardin's original task list numbered 38 but 6 of those tasks were duplicates. Taking into consideration those 6 duplicate tasks, the task list totaled 33.<sup>20</sup>

Dr. Mills reviewed Mr. Hardin's task list and utilizing the permanent work restrictions he imposed, opined that claimant did not have any task loss. Dr. Murati, however, utilizing the permanent work restrictions he imposed, opined that claimant could no longer perform 7 of the 33 tasks for a 21 percent task loss. Dr. Brown also reviewed Mr. Hardin's task list and utilizing the permanent work restrictions he imposed, first testified that claimant could no longer perform 6 of the 33 tasks. But when it was pointed out to Dr. Brown that two of the tasks on page G of Hardin's task list for the job claimant performed at the IGA store only required claimant to lift occasionally 40 pounds, Dr. Brown changed the no to yes on the two tasks because his restrictions allowed claimant to lift 50 pounds occasionally.<sup>21</sup> With that correction, Dr. Brown's opinion was that claimant had lost his ability to perform 4 of the 33 tasks for a 12 percent task loss. Dr. Brown also changed a no to a yes on two tasks listed on page E of Mr. Hardin's task list. But the change was made representing that claimant had indicated that he only had to lift 1 pound instead of the 2 to 40 pounds and

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<sup>17</sup> *Tallman v. Case Corporation*, 265,276, 2002 WL \_\_\_\_ (Kan. WCAB Nov. 27, 2002).

<sup>18</sup> See K.S.A. 1998 Supp. 44-510e(a).

<sup>19</sup> R.H. Trans. at 46-48.

<sup>20</sup> Hardin Depo. at 41-42.

<sup>21</sup> Brown Depo. at 19.

1 to 30 pounds as listed on the task list. The Board finds that the change claimant made on page E of the task list was that he only had to occasionally lift 2 to 40 pounds and 1 to 30 pounds and did not correct the task list to indicate only 1 pound.<sup>22</sup>

The Board finds all three physicians task loss opinions should be given equal weight because claimant's appropriate task loss lies somewhere between Dr. Mills' 0 percent opinion and Dr. Murati's 21 percent opinion. Thus, the Board concludes the claimant has 11 percent task loss.

In regard to wage loss, claimant received unemployment benefits from February 5, 2000, until he found employment at WalMart on July 20, 2000, working 36 hours per week at \$6.00 per hour or \$216 per week. Claimant testified that during the period he was unemployed he contacted at least 2 employers per week as required to qualify for unemployment. The Board finds that during that period claimant made a good faith effort to find appropriate employment and his wage loss should be 100 percent.<sup>23</sup>

Claimant worked at WalMart from July 20, 2000, until he found other employment earning \$316.49 per week with fringe benefits on November 22, 2000. Thus, while claimant was working at WalMart he had a wage loss of 72 percent. (\$774.72 pre-injury average weekly wage compared to \$216 post-injury average weekly wage). After November 22, 2000, claimant had a wage loss of 59 percent. (\$774.72 pre-injury average weekly wage compared to \$316.49 post-injury average weekly wage).

The Board concludes, based on the above findings and conclusions, that the May 13, 1999, Settlement for the September 22, 1998, accident should be modified as follows:

A. The May 13, 1999, Settlement entitled claimant to 12.45 weeks of permanent partial disability at \$366 per week or \$4,556.70 for a 3 percent permanent partial general disability based on permanent functional impairment.

B. From June 15, 1999, the date of the increased disability through January 17, 1999, the date claimant was released by Dr. Mills to return to work, claimant was paid 27 weeks of temporary total disability compensation at \$366 per week or \$9,882.

C. From January 18, 1999, through February 4, 2000, claimant returned to work at his regular job at no wage loss and was entitled to 2.57 weeks of permanent partial

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<sup>22</sup> R.H. Trans. at 47-48.

<sup>23</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

disability at \$366 per week or \$940.62 for a 15 percent<sup>24</sup> permanent partial general disability based on functional impairment.

D. From February 5, 2000, through July 19, 2000, claimant was unemployed receiving unemployment benefits, and making a good faith effort to find employment. During that period, claimant is entitled to 23.71 weeks of permanent partial disability compensation of \$366 per week or \$8,677.86 for a 56 percent permanent partial general disability (100 percent wage loss averaged with a 11 percent task loss).

E. From July 20, 2000, through November 21, 2000, claimant worked for WalMart earning \$216 per week. During that period, claimant is entitled to 27.14 weeks of permanent partial disability at \$366 per week or \$9,933.24, for a 42 percent permanent partial general disability (72 percent wage loss averaged with an 11 percent task loss).

F. On November 22, 2000, claimant commenced working other employment earning \$316.49 per week. During the period after November 22, 2000, claimant is entitled to 75.18 weeks of permanent partial disability at \$366 per week or \$27,515.88, for a 35 percent permanent partial general disability (59 percent wage loss averaged with an 11 percent task loss).

G. This makes a total modified award in the amount of \$61,506.30.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that Nelsonna Potts Barnes' September 21, 2001, Award should be modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Brian Dry, and against the respondent, Precision Machine and Supply, and its insurance carrier, Hartford Accidental and Indemnity for an accidental injury which occurred on September 22, 1998, and based upon an average weekly wage of \$774.72.

Claimant is entitled to 27 weeks of temporary total disability compensation at the rate of \$366 per week or \$9,882, followed by 15.02<sup>25</sup> weeks of permanent partial disability compensation at the rate of \$366 per week or \$5,497.32, for a 15 percent permanent

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<sup>24</sup> The 15 percent represents the increase in claimant's disability due to the June 15, 1999, herniated disc, and the 3 percent paid in the May 13, 1999, Settlement is included in this 15 percent permanent functional impairment rating.

<sup>25</sup> The 15.02 permanent partial disability weeks include the original 12.45 permanent partial disability weeks paid in the May 13, 1999, Settlement based on a 3 percent permanent functional impairment rating.

partial general disability based on permanent functional impairment, followed by 126.03<sup>26</sup> weeks of permanent partial disability at the rate of \$366 per week or \$46,126.98, for a 35 percent permanent partial general disability, making a total award of \$61,506.30, which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

Respondent Precision and its insurance carrier Hartford are ordered to pay all reasonable and necessary medical expenses for the September 28, 1998, low back injury as authorized medical.

All other orders contained in the Award are adopted by the Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant  
Richard J. Liby, Attorney for Hartford Accident and Indemnity  
William Townsley, Attorney for Travelers Insurance Company  
Nelsonna Potts Barnes, Administrative Law Judge  
Director, Division of Workers Compensation

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<sup>26</sup> The 126.03 permanent partial disability weeks include the various periods of work disability percentage changes resulting from a change in claimant's post-injury average weekly wage as set forth on pages 12-13 of this Order.